



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 104 OF 2016

(Before D. K. N. Marete)

EUNICE JEPTOO KIRUI.....CLAIMANT

VERSUS

EASTERN PRODUCE (K) LTD.....RESPONDENT

JUDGEMENT

This matter is brought to court by way of a Memorandum of Claim dated 10th June, 2016. The issues in dispute are therein cited as;

- a. Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the respondent;*
- b. Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from the employment as prayed for in this memorandum of claim;*
- c. Whether the claimant is entitled to an award of a certificate of service;*
- d. Who should pay costs and interests of the suit?*

The respondent in a Replying Memorandum dated 29th June, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that she was employed by the respondent as a Tea Picker with effect from 5th August, 2008 at a monthly salary of Kshs.10,000.00. At the time of her unfair termination on 17th January, 2015, he earned Kshs.11,380.00.

It is the claimant's case that hers employment with the respondent was reduced into contractual terms with effect from 8th November,2014 for a period of nine months ending on 1st January, 2016. The termination of service on 17th January, 2015 therefore amounted to a breach of the terms of contract.

The claimant's other case is that her termination from employment was by the respondents manager, one, Jonathan Kipruto, telling her that her work was over and she should go home. She thereafter reported the matter to the union office at Nandi Hills. The union call officer, a Mr. Ochieng promised to act on the matter but did not.

The claimant further submits that she went back to the branch manager Mr. Kipruto after a week on the 24th January, 2015 to find out whether she could be reinstated back to her work but the said manager told her that she should vacate the company premises as she had reported the company at the union and that she did not have any business going back to him.

The claimant again avers that this was a breach of Section 41,43,45(2) & 44(4) of the Employment Act as follows;

14. Section 41 of the Employment Act 2007 provides that when an employer intends to dismiss or terminate the employment of an employee from among other reasons misconduct, it must explain to the employee in a language he/she understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant contends that the respondent never explained to him precisely the reasons for his termination from employment.

15. Section 43 of the Employment Act 2007 provides that any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of

Section 45.

16. Section 45 (2) of the Employment Act, 2007 provides that an unfair termination occurs when the employer fails to prove that;

- a) The reason for termination is valid*
- b) The reason for the termination is a fair reason (s)*
- c) The employment was terminated in accordance with fair procedure*

It is the claimant's case that the termination of employment by the respondent was unfair as it violated the requirements of the above section of the Employment Act.

she prays as follows;

a. Two months pay lieu of Notice

Basic + House allowance

11,380 x 2Kshs.22,760/=

b. Leave dues for the entire period worked.

One month salary x years worked.

11,380 x 12monthsKshs.79,660/=

c. Compensation for unfair termination

Section 49 (c) of the employment Act

Gross pay x 12 months

11380 x 12 monthsKshs.136,560/=

d. Overtime dues

45 hours per week (statutory hours as per Regulation of wages General (Order)

Claimant worked from 7am to 6pm daily making 10 hours

10hrs x 6 days = 60 hrs – 45 = 15 hrs overtime per week

15hrs x 4 weeks = 60 per month

60 x 1.5 x 11380 /195= 5252.31/-

5252.31 x 76 monthsKshs.399.175.38/=

e. Breach of contract

June 2014 – March 2015

11,380 x 8 monthsKshs.91,040/=

f. House allowance for the period worked

15 days salary for January, 2015 Kshs.5690/=

TOTAL

Kshs.734.885.38/=

In the penultimate, she prays for:

a. Declaration that the claimant's termination from employment was unlawful, unprocedural and unfair and in the circumstance the claimant is entitled to compensation as prayed for herein above.

b. The sum of Kshs. 750,846.60/- as set out herein above.

c. Cost of this suit and interests on at court rates from time of filing suit until payment in full and

d. A certificate of service as per section 51 of the employment Act.

e. Any other further and better relief the Honourable Court may deem just and fit to grant.

The respondent entirely denies the claim and avers that the claimant has no reasonable cause of action against the respondent and further that the claim is an abuse of the process of court and therefore should be dismissed with costs.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant wrongful, unfair and unlawful.
2. Whether the claimant entitled to the relief sought.
3. Who bears the costs of this cause.

The 1st issue for determination is whether the termination of the employment of the claimant wrongful, unfair and unlawful. The claimant in his written submissions dated 30th November, 2016 submits that the issue of employment is not disputed and therefore a none issue.

He proceeds to narrate the sequence of events leading to his termination on 17th June, 2016 without

regard to the law and processes enunciated under sections 41, 43 and 45 of the Employment Act, 2007 as pleaded. The claimant submits a case of falsification and manipulation of the respondent list of documents to paint a different scenario and therefore gain capital in this litigation. This is as follows;

3. The claimant states that the last day she was on duty was the 18th of January 2016, when she came to work, but the respondent did not allow her to proceed on duty, for reason that she had reported the company to the labour office for allegedly dismissing her from employment. The respondent's submissions are misleading, for reason that the claimant pleaded she was terminated from employment on 17th January 2016 and not as alleged by the respondent, on 7th January 2016. In fact, the attendance checklist is in support of the claimant's allegiances'.

We submit that having failed to discharge the burden of proof, then this court ought to dismiss the allegation.

4. The claimant aver that what has been exhibited by the respondent as fixed term contract in its list of documents filed in court on the 26th July, 2016 was never received and/or signed by the claimant. All in all the same is an admission from the part of the respondent that indeed it employed the claimant as a tea picker. It is therefore absurd that the respondent is denying in its defense that it never employed the claimant. In any event the evidence of the claimant as outlined herein above was not challenged and/or controverted by the respondent vide its defence nor submissions'

5. The claimant further states that there was lack of both substantive justification and procedural fairness in his termination. The claimant was not heard, he was never issued with termination notices and no reason given for his termination was given, and if at all, the same was not a valid reason.

The respondent submits a case of absconding duty by the claimant leading to his termination of employment. It is her submission that this absenteeism was tantamount to gross misconduct and therefore the justification of termination of employment.

This is a case of your word against mine. It is an appropriate case for determination through the principle of balance of probabilities. That is, of the two cases, which is the more probable in the circumstances? I find a case for the claimant. This is the more probable and realistic of the two. Further, the respondent does not address or in any way dispute the claimant's submission of falsification of documents relied on in support of her case. This is telling. I therefore find a case of wrongful, unfair and unlawful termination of employment to the claimant by the respondent. This answers the 1st issue of for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won a case of unlawful termination of employment, the claimant becomes entitled to the relief sought. And here goes down the 2nd issue for determination.

I am therefore inclined to allow the claim and order relief as follows;

- i. One (1) month salary in lieu of notice Kshs.12,490.00
- ii. Leave due but untaken Kshs.12,490.00
- iii. The cost of this claim shall be borne by the respondent

This court is however, is disabled in a computation of compensation for unfair termination of employment because the data provided for in the pay slips annexed to the claim are not clear as to whether the amounts paid were based on the harvest quantity or monthly salaries. The law requires that computation of compensation for unlawful termination of employment be pegged on the monthly salary

of the employee. This should be clearly pleaded and demonstrated in evidence. Any departure from the provisions of the law would be absurd and unacceptable.

Delivered, dated and signed this 21st day of February, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the Claimant
2. Miss.Kipyego instructed by Kibichy & Company Advocates for the Respondent.